Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

TEAMSTERS BREWERY & SOFT DRINK WORKERS LOCAL UNION 896, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,
Petitioner,

v.

ANHEUSER-BUSCH, INC., ROBERT WARNER, a.ka. BOB WARNER, and DOES 1 through 100, inclusive,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the lower court's finding that state law is completely preempted by the mere existence of a collective bargaining agreement, leaving individual union members without redress for violation of important state constitutional and statutory rights, erroneous?

LIST OF PARTIES

The named parties to the proceedings below and before this Court are:

1. Teamsters Brewery & Soft Drink Workers Local Union 896, International Brotherhood of Teamsters, AFL-CIO;

2. Anheuser-Busch, Inc.; and

3. Robert Warner, a.k.a Bob Warner.

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PETITION FOR WRIT OF CERTIORARI

Teamsters Brewery & Soft Drink Workers Local Union 896, International Brotherhood of Teamsters, AFL-CIO, (hereinafter "Union") respectfully prays for issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 23, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix A, *infra*) is not reported. The court's order denying Union's petition for rehearing and rejecting Union's suggestion for rehearing *en banc* (Appendix B, *infra*) was filed on December 23, 1997. The

order of the United States District Court for the Central District of California (Appendix C, *infra*) was filed on May 24, 1996, and entered on May 28, 1996. It is also not reported.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). An application for an extension of time in which to file this petition for Writ of Certiorari (Docket Number 97-3-00673) was presented to Justice O'Connor, who, on March 12, 1998, extended the time to and including April 10, 1998. This petition is therefore timely filed with this Court pursuant to 28 U.S.C. § 2101(c).

STATUTES INVOLVED

The relevant statutory provisions are:

1. California Constitution, Article 1, § 1.

2. California Penal Code § 236.

3. Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185.

STATEMENT OF THE CASE

Petitioner Union, an affiliate of the International Brotherhood of Teamsters, AFL-CIO, is an unincorporated labor organization within the meaning of California Labor Code § 1117 and the National Labor Relations Act § 2(5), as amended, 29 U.S.C. § 152(5). Union represents approximately 783 employees of Respondent Anheuser-Busch, Inc. (hereinafter "Company") at its production facility located in a suburb of Los Angeles, California.

On behalf of its members employed by Company, Union brought suit against Company and Respondent Robert Warner, a.k.a Bob Warner, Company's personnel manager at its Los Angeles area facility, in the Superior Court for the County of Los Angeles, State of California,

alleging two (2) state law tort claims for false imprisonment and violation of the members' right to privacy.

These causes of action arose from actions taken by Company on August 18, 1996. Late in the day, at the close of the first shift, Company herded approximately 235 day shift workers out of the plant into an outdoor area between the plant and employee parking lot. This area is entirely enclosed by wire mesh fencing. Egress from this area to the Company parking lot, where most employees' vehicles were parked and to public property is through a six foot turnstile governed by magnetized employee identification cards. On this day, these employees were not allowed back into the plant after entering the prison-like caged area. Additionally, the exit turnstile was shut down by Company, so that its employees were confined within this outdoor wire-fenced area adjacent to the plant like so many holocaust victims. Each was required to consent to a search of his or her person and effects before being allowed to leave *via* the turnstile. Each was individually searched as the rest waited.

At the same time, several employees who had parked in the Company parking lot were required, after being personally searched, to consent to a search of their vehicle as a condition of leaving the parking lot. Trained dogs were brought in to canvass the parking lot and identify the possible presence of drugs in vehicles. Any vehicle singled out by a dog was noted and, as soon as an employee approached one of these vehicles, a search was demanded. Employees who did not have vehicles in the lot could leave, but only after they consented to a personal search.

This process continued into the night for over five (5) hours. Employees who had not yet been searched were held, off the time clock,[1] as the searches were completed.

---

[1] Company initially refused to pay its employees for their time spent as prisoners. After a few weeks, following heated objections from Union, they were paid for their time spent against their will.

This lengthy, involuntary confinement behind wire mesh fencing, resulted in the discovery of nothing on anyone's person or in their effects; in one vehicle two (2) large dog biscuits and a large bag of table salt were discovered and in another, a bag of bird seed was retrieved. No drugs were found in either of these vehicles. Three employees in the bargaining unit were terminated; one for refusing to surrender his car to a search; a second, whose vehicle contained a few marijuana seeds and two "butts," was terminated, but subsequently reinstated; and a third, whose vehicle contained what he said was his cousin's marijuana, had his termination upheld. Two others who were not in the Union's bargaining unit were terminated for refusing to allow a search of their vehicles. The only other vehicle in which even a minute quantity of any illegal drug or prohibited substance was found was a vehicle being driven by one of Company's own security guards.

The Company removed this State Court tort action to the United States District Court for the Central District of California. The District Court, the Honorable A. Andrew Hauk presiding, denied the Union's motion to remand. Instead, Judge Hauk held the tort claims preempted under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and the action properly removed because the preemption defense conferred federal question jurisdiction under 28 U.S.C. §§ 1331, 1441(h) and 29 U.S.C. § 185.

Shortly thereafter, the District Court granted Company's motion for summary judgment on the grounds that each and every claim in the complaint was preempted under Section 301. The Union timely appealed to the United States Court of Appeals for the Ninth Circuit. Following briefing and oral argument, the Court of Appeals issued a one sentence opinion affirming the judgment of the District Court. A timely petition for rehearing

en banc, filed by Union, was denied and this petition followed.

REASONS FOR GRANTING THE PETITION

I. THE STATE LAW CLAIMS ERRONEOUSLY FOUND TO BE PREEMPTED BY THE COURT BELOW INVOLVE IMPORTANT AND INALIENABLE STATE RIGHTS

The State of California invests each of its citizens, through its Constitution and laws, with certain basic rights that may neither be abridged nor compromised. Citizens of this state do not "check" these basic rights at the door of their workplaces. Rather, they carry them everywhere as an inalienable shield against certain fundamental intrusions. The state law claims found preempted in this case are such basic rights.

First, the right to be free from false imprisonment is not preempted. This right, amongst the most essential of all rights granted citizens, has been reaffirmed again and again by the courts of California. Second, the right to privacy, considered so paramount the voters of California have added it to Article 1, § 1 of the State Constitution, cannot be preempted either.

These rights are important and inalienable. They stand apart and separate from either Union's or Company's rights under a collective bargaining agreement. The lower court's finding that their citizens of California cannot have redress for violation of these personal rights in state court, like others, simply because they work pursuant to a collective bargaining agreement, is erroneous and must be overturned.

A. California Law Protects All Of Its Citizens From False Imprisonment

The tort of false imprisonment in California is "the unlawful violation of the personal liberty of another."

California Penal Code Section 236; *Molko v. Holy Spirit Association for the Unification of World Christianity*, 46 Cal. 3d 1092, 1123, 252 Cal. Rptr. 122 (1988) (holding the tort cause of action to be identified to the criminal cause of action). The California Supreme Court in *Molko* defined the tort of false imprisonment as follows:

> [T]he non-consensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short. A person is falsely imprisoned if he is wrongfully deprived of his freedom to leave a particular place by the conduct of another.

Molko, 46 Cal. 3d 1092, 1123 (citations omitted).

The California Supreme Court has explicitly offered this right to all California workers by finding the right beyond the scope of their "compensation bargain." *Fermino v. Fedco, Inc.*, 7 Cal. 4th 701, 706 30 Cal. Rptr 2d 18, 19 (1994).

In *Fermino* the California Supreme Court specifically examined the scope of a false imprisonment claim to determine whether it was preempted by California's Worker Compensation system. This Court rejected an employer's preemption claim on the grounds that false imprisonment by an employer while possibly motivated by "initially legitimate motives," *Id.* at 716, is, by definition, an unreasonable and criminal confinement, beyond the scope of the employment relationship. Using words that ironically mirror the relevant facts here, the court stated "[w]hen an employer forcibly and criminally deprives an employee of her liberty, even as a means to otherwise legitimate ends, it steps outside its 'proper role,' whether it uses assault and battery to enforce that false imprisonment, or employs some other coercive stratagem." *Id.* at 721.

The required confinement can be brief, as little as fifteen minutes; let alone several hours as occurred in this

case. *See Scofield v. Critical Air Medicine, Inc.*, 45 Cal. App. 4th 990, 1001, 52 Cal. Rptr. 2d 915 (1996). The restraint may be effectuated by means of physical force, threat of force or arrest, confinement by physical barriers, or by means of any other form of unreasonable duress, including fraud or deceit. *Scofield*, 45 Cal. App. 4th 990, 1001-1002. The confinement experienced by 235 employee-claimants in this case, who were held for periods of up to five hours behind a six-foot high wire mesh fence, certainly qualifies.

The "personal interest in freedom from restraint of movement" is considered so important the state allows a cause of action to stand even if a plaintiff only suffers nominal damages. *Scofield*, 45 Cal. App. 4th 990, 1008, (*quoting Jackson v. City of San Diego*, 121 Cal. App. 3d 579, 585, 175 Cal. Rptr. 395 (1981)). Recovery may be had for any resulting harm, including loss of time, physical discomfort or inconvenience; any resulting physical illness or injury to health, business interruption, and damage in reputation; as well as punitive damages in appropriate cases. *Scofield*, 45 Cal. App. 4th 990, 1009 (upholding a $120,000 award for false imprisonment).

Many day shift employees here were held late into the night, confined, confused, and unable to meet family and other personal commitments while they waited for Company to release them. The only redress for these and other harms suffered by these California citizens lies in the claims they have attempted to bring in state court. Had they been employed in a non-union setting, they would have already had redress. The State of California has made clear it considers the right to be free from false imprisonment a badge of citizenship belonging to all state residents. The lower court's sanction of this deprivation, simply on account of the selection of a bargaining agent, was unlawfully discriminatory and unsupportable.

B. The California Constitution Guarantees The Privacy Rights Of Its Citizens

Article 1, Section 1 of the California Constitution creates a right of action against private entities, including employers, for the tort of invasion of privacy. *Landon v. Northwest Airlines, Inc.*, 72 F.3d 620, 626 (8th Cir. 1995), *citing Hill v. National Collegiate Athletic Association*, 7 Cal. 4th 1, 20, 26 Cal. Rptr. 2d 834 (1994). *See, also Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260 (9th Cir. 1998) (analyzing Title VII, ADA, federal and state constitutional claims).

There are three threshold elements to the cause of action: (1) identification of a specific, legally protected privacy interest, *Norman* at 1271, (2) a reasonable expectation of privacy on the plaintiff's part, *id.;* and (3) conduct by a defendant that amounts to a "serious invasion" of the protected privacy interest, *id.* (*quoting Loder v. City of Glendale*, 14 Cal. 4th 846, 59 Cal. Rptr. 2d 696 (1997)). Upon proof of these elements, a state court will then balance "the countervailing interests for the conduct in question against the intrusion on privacy resulting from the conduct." *Norman* at 1271.

Any California citizen, including one who works under the terms of a collective bargaining agreement, is lawfully permitted to assert this right in the absence of a clear and specific waiver. *See e.g., Norman.* In *Norman,* the Ninth Circuit examined whether completion of an extensive questionnaire, pursuant to an employer required medical examination, gave an employer the right to test otherwise permissibly obtained blood and urine samples for such conditions as sickle cell anemia, syphilis, and pregnancy. *Id.* at 1265. The employer argued the employees check-mark, "yes" or "no" answers, to questions regarding the sickle cell trait, sexually transmitted diseases, and menstrual disorders constituted employee consent to the employer tests. *Id.* at 1270-71. The court disagreed, finding that submission to an employment re-

lated medical examination did not put employees on notice they would be further tested for such personal conditions. *Id.* at 1268. Similarly here, working under the terms of a collective bargaining agreement (especially one that is entirely silent on this subject) does not serve as a waiver of all rights to personal privacy.

All California workers are entitled to general damages to compensate for injury to peace of mind and feelings when their personal privacy has been invaded. In addition, "special damages need not be charged or proven, and if the proof discloses a wrongful invasion of the rights of privacy, substantial damages for mental anguish alone may be recovered." *Miller v. National Broadcasting Co.*, 187 Cal. App. 3d 1463, 1485, 232 Cal. Rptr. 668 (1986) (citations omitted). Here, Company inflicted such damages on its employees when, without their waiver, it arbitrarily forced hundreds of them to be searched. These injuries may, and should, be redressed under state laws.

II. FEDERAL LABOR POLICY DOES NOT REQUIRE EMPLOYEES COVERED BY COLLECTIVE BARGAINING AGREEMENTS TO GIVE UP RIGHTS UNDER STATE LAW WHICH ARE INDEPENDENT OF SUCH AGREEMENTS

The elements of each of these causes focus only the facts surrounding the confinement and coerced searches of these California citizens. The collective bargaining agreement is devoid of reference to these subjects thus these causes of action should have been allowed to proceed in the courts of the State of California.

Presumably, the lower court reasoned any transaction between the Company and its employees is *ipso facto* covered by the Company's collective bargaining agreement with the Union, and therefore preempted from adjudication in the State Courts. This broadly punitive holding simply misapprehends applicable law.

Parties come to a collective bargaining table with a backdrop of fundamental employee rights provided by state legislatures to all of their citizens. Neither party may bargain away these fundamental individual rights without at least some express intention to do so. And, some basic rights may not be bargained away under any circumstances. "As with any contract, . . . a court may not enforce a collective bargaining agreement that is contrary to public policy." *W. R. Grace and Co. v. Local Union 759,* 461 U.S. 757, 766 (1983). Parties can, for example, choose if they wish to bargain away overtime premiums, *Livadas v. Bradshaw,* 512 U.S. 107, 131 (1994), but cannot bargain away the right to be free from discrimination on the basis of race, age, sex or disability. *Jimeno v. Mobil Co.,* 66 F.3d 1514 (9th Cir. 1995); *Mitchell v. National Broadcasting Co., Inc.,* 553 F.2d 265 (2nd Cir. 1977).

Even with respect to state statutes regulating employment relationships, this Court has repeatedly rejected the principle that every such statute is *a fortiori* preempted by the existence of a collective bargaining agreement. In *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724 (1985), this Court unanimously rejected the argument that Congress "intended to prevent the states from establishing minimum employment standards that the parties would otherwise have been required to negotiate from their federally protected bargaining position." *Id.* at 751.

Noting that Congress never intended to exempt those covered by union contracts and their employers from federal minimum standards, the Court held there was no reason to treat state minimum standards differently:

> Minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA. Nor do they have any but the most indirect effect on the right of self-

> organization established in the Act. . . . Rather, they are minimum standards 'independent of the collective bargaining process [that] devolve on [employees] as individual workers, not as members of a collective organization.'

Metropolitan Life, 471 U.S. 724, 755 (quoting *Barrentine v. Arkansas Best Freight System, Inc.*, 450 U.S. 728, 745 (1981)).

This Court revisited the question in *Livadas*. The question there was whether an employee covered by a collective bargaining agreement was excluded from the protections of a California statute requiring employers to pay all wages due immediately upon termination of employment, merely by virtue of employment pursuant to that agreement. This Court observed:

> In an effort to give wide berth to federal labor law and policy, the Commissioner declines to enforce union-represented employees' claims rooted in nonwaivable rights ostensibly secured by state law to all employees. . . . Federal labor law does not require such a heavy handed policy, and indeed, cannot permit it.

Livadas, supra, 512 U.S. 107, 134. Thus, this Court reaffirmed the guiding principle that state rights existing independent of collective bargaining agreements cannot be denied employees solely on the basis of their selection of a bargaining agent.

If unions and employers are not free to contract away fundamental state law rights, what sense does it make for federal courts to do so? If a guiding light behind the preemption principle is consistency and federal supremacy, what interest is served by allowing an employer to escape liability simply due to its employees' exercise of federally protected rights? Did the fundamental nature of each of these state law torts disappear when these employees chose a union? Clearly not.

Employees do not give up their rights to be free from physical or sexual assault when they walk through the plant door. *Jackson v. Kimel*, 992 F.2d 1318 (4th Cir. 1993). Indeed, it is unlawful for a collective bargaining agreement to attempt to extinguish such rights. "Clearly, § 301 does not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law." *Allis Chalmers*, 471 U.S. 202, 212 (1985).

Similarly, employees do not give up their rights under state law to be protected from defamation by virtue of working pursuant to a collective bargaining agreement. *Luecke v. Schnucks Markets, Inc.*, 85 F.3d 356 (8th Cir. 1996). State torts suits seeking damages for allegedly defamatory statements, which exceed the scope of what the NLRB has found to be commonplace labor epithets, are not preempted by federal labor policy. *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 60 (1966).

In *Tellez v. Pacific Gas and Electric Co.*, 817 F.2d 536 (9th Cir. 1987), *cert. denied*, 484 U.S. 908 (1987), the Ninth Circuit did not find preempted an employee's claims for defamation and intentional infliction of emotional distress. The Circuit held that defamation did not draw upon the collective bargaining agreement for sustenance. Reflecting an employer's claim that arbitration of the discipline was the exclusive remedy, the court ruled an arbitrator would have "no authority to decide questions of intent, privilege and injury and no standards by which to judge the defamation claim." *Id.* at 538.

Likewise, the intentional infliction of emotional distress claim was not preempted. That tort, the court found, requires extreme and outrageous behavior, and the collective bargaining agreement neither addressed nor envisioned such behavior. Ruling the grievance procedure unequipped to address such behavior, the court found the

contract did not provide an appropriate remedy. *Id.* at 539. The claim was not preempted.

In reaching its decision, the *Tellez* court distinguished a case relied upon by the lower court here. *See Truex v. Garrett Freightlines, Inc.*, 784 F.2d 1347 (9th Cir. 1985). In *Truex*, the actions complained of, *e.g.* excessive supervision, unjustified warning letters and alteration of work schedules, were in essence "claims that administration of discipline was improper under the standards set by the collective bargaining agreement." *Id.* at 1350. This conduct is exactly the type of employer activity a union and employer traditionally seek to regulate in a collective bargaining agreement. Here, as in *Tellez*, exactly the opposite is true. These claims have nothing to do with, nor are they in any way dependent upon, any analysis of the collective bargaining agreement.

This Court expressed similar views in *Farmer v. United Brotherhood of Carpenters & Joiners,* 430 U.S. 290 (1977), holding that whether the operation of a hiring hall violated federal labor statutes, the outrageous conduct alleged was so far outside the scope of conduct regulated by the NLRA a suit for intentional infliction of emotional distress could not be preempted. And, of importance here, the *Farmer* Court established a two (2) prong analysis for state jurisdiction to withstand a claim of NLRA preemption: "the state tort [must] be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished. . . ." *Id.* at 305 (footnote omitted).

In *Keehr v. Consolidated Freightways of Delaware, Inc.*, 825 F.2d 133 (7th Cir. 1987), the court cited *Farmer* as authority for the rule that both intentional infliction of emotional distress *and* invasion of privacy are not preempted by the NLRA. The court held the rationale was the same—where the conduct by employer is carried out in a particularly abusive manner as to be "highly

offensive to a reasonable person," the federal policy of leaving the dispute to be resolved within the grievance/arbitration mechanism does not mandate preemption of the state court tort action. *Keehr* at 137.

Here, the principles are the same. No logical reason compels a different conclusion than was reached in *Farmer* simply because this is a Section 301 preemption claim under a collective bargaining agreement. Indeed, if consistency is one of the goals of the doctrine, this holding cannot be reconciled with *Farmer* or *Keehr*. Not only does this collective bargaining agreement not contain a provision on the subject of employee confinement or searches, it probably could not. In sum, no reasonable person could fail to be offended by the outrageous tactics of Company in confining and searching its own unsuspecting employees. The collective bargaining agreement should provide no shield against such misconduct.

III. BECAUSE THE COURTS OF APPEALS CONTINUE TO APPLY THE PREEMPTION DOCTRINE IN A FRACTURED MANNER, EVEN AFTER THIS COURT'S DECISION IN *LIVADAS v. BRADSHAW*, THIS IS NOW A "FIT OCCASION" TO SPELL OUT THE SCOPE OF THE PREEMPTION DOCTRINE

As this Court noted in *Livadas*, the courts of appeals historically "have not been entirely uniform in their understanding and application of [the various preemption doctrines]." *Livadas, supra*, 512 U.S. 107, 124 n.18. Unfortunately, this continues to be the case even after *Livadas*, with some Circuits applying the various preemption doctrines narrowly, and others continuing to apply them quite broadly, so that the resulting fabric of preemption law appears to have been cut with pinking shears rather than a sharpened pair of scissors.

In the instant case, the Circuit applied Section 301 preemption broadly, holding the mere existence of a collective bargaining agreement, without reference to a single ap-

plicable provision, preempted these union members' state law claims.

Similarly, in *Antol v. Esposto,* 100 F.3d 1111 (3rd Cir. 1996), the Third Circuit, over a vigorous dissent that relied heavily on *Livadas,* crafted a very broad application of the doctrine. In that case, the issue was whether laid-off employees of a bankrupt business could bring actions for wages earned, but never paid, against the majority shareholders of the employer, under the Pennsylvania Wage Payment and Collection Law allowing such suits. Although the dissent argued that the amounts due could be easily calculated merely by taking the daily wage rates of the employees from the Appendix, the panel found the claims under the Pennsylvania Act to be preempted and upheld summary judgment for the owners of the business.

The Seventh Circuit, as well, has recently broadened their interpretation of the preemption doctrine. In *Atchley v. Heritage Cable Vision Association,* 101 F.3d 495 (7th Cir. 1996), the court held a state wage law preempted simply because the trigger date for penalties would involve looking at a provision of a collective bargaining agreement to decide when the payments were due. This holding, based on facts strikingly similar to those in *Livadas,* makes clear how divergent the interpretations have become.

In sharp contrast, the Fifth Circuit employs a much narrower standard. In *Branson v. Greyhound Lines, Inc.,* 126 F.3d 747 (5th Cir. 1997), *cert. denied,* —— S. Ct. ——, 1998 WL 54130 (1998), the Circuit held an employee's breach of contract claim against the employer not preempted. The agreement in question was a 1990 offer, by the employer, of a super seniority award (called EBS) to all employees who were willing to return to work during a strike. When the strike ended, a new collective bargaining agreement was reached that did *not* provide recognition of EBS. Upon examining the new collective bargaining agreement, the court stated

> [t]he seniority provision of the 1993 CBA, however, contains no precise definition of EBS, nor does it clarify whether EBS contemplated the extension of seniority credit only for non-Greyhound driving experience. Even if it did, what [the employer] and the Union say in 1993 (in the CBA) about what [the Employer] and [the Plaintiff] agreed to in 1990 cannot alter the analysis of the 1990 agreement itself.

Id. at 754. This detailed analysis not only represents a divergent approach from that of other Circuits, but by yielding a finding of no preemption, the case becomes rather extraordinary.

The Second Circuit has also taken a more restricted view of the preemption doctrine. In *Foy v. Pratt & Whitney Group*, 127 F.3d 229 (2nd Cir 1997), the Circuit held union members' state negligent misrepresentation claims were not preempted by Section 301. The causes of action arose out of a manager's alleged representations to employees whose work had been transferred to another plant that, if they were to forgo a limited transfer opportunity, they would be afforded another such opportunity before they were actually laid off. Examining the elements of the claim, and acknowledging that at least one of them —whether the employee's reliance on the manager's representation was reasonable—might implicate the transfer and layoff provisions of the collective bargaining agreement, the court nonetheless concluded

> [t]hese plaintiffs' state law misrepresentation claims depend upon the employer's behavior, motivation, and statements, as well as plaintiffs' conduct, their understanding of the alleged offer made to them, and their reliance on it. [cite ommitted] Reference to the CBA may be needed, but state law will play no part in determining what the parties agreed to in the CBA or whether the CBA has been breached.

Id. at 235.

The Fifth and Second Circuit interpretations of the scope of preemption are certainly more in line with this Court's reasoning in *Livadas* and are distinct from that of the other Circuits. In light of this division among the Circuits, the Union respectfully urges this Court to clarify the scope of a doctrine impacting the basic rights of thousands of workers across this country each year.

IV. THE COURTS BELOW APPLIED THE WRONG STANDARD TO DETERMINE WHETHER THESE STATE LAW CLAIMS ARE PREEMPTED

The lower courts in this case misread the narrowing focus of at least one branch of the preemption doctrine in the aftermath of *Allis Chalmers, Metropolitan Life, Lingle* and *Livadas*. The lower court's holding, that state law claims "require interpretation of the [collective-bargaining] agreement for their resolution" implies that federal courts should conduct an investigation as to the degree of interpretation of the collective bargaining agreement necessary. Under this theory, if the inquiry requires even the slightest interpretation, the state law claim is preempted, regardless of whether the state law public right exists completely independent of the contract language.

This construction is at odds with *Allis Chalmers*, which held state law claims, whatever their label, which seek in substance to remedy a denial of contract rights under the collective-bargaining agreement are preempted. As this Court stated in *Livadas*, "it is the legal character of the claim, as 'independent' of rights under the collective-bargaining agreement, . . . that decides whether a state cause of action may go forward." *Livadas, supra*, 512 U.S. 107, 123-24 (cites omitted).

The correct standard for determining whether a state law claim exists independently of the collective bargaining agreement is whether resolution of the state claim is so enmeshed within the collective-bargaining agreement as to

make extrication of the two impossible As this Court stated,

> [o]ur analysis must focus, then, on whether the Wisconsin tort action for breach of the duty of good faith as applied here confers nonnegotiable state law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract. If the state tort law purports to define the meaning of the contract relationship, that law is preempted.

Allis Chalmers, 471 U.S. 202, 213.

The fact that any preemption determination, where an employment contract exists, invariably involves a look at the contract has led to this confused state of affairs. The result has been discriminatory deprivation for employees of a myriad of substantive state rights which in no way derive from their private contractual agreements, whether arrived at through collective bargaining or otherwise—e.g., rights against wrongful discharge,[2] retaliatory discharge,[3] and defamation,[4] as well as wage laws, such as those overturned by this Court in *Livadas*.

In the instant case, the indisputable absence of any provision in the collective bargaining agreement even purporting to address false imprisonment or employee searches, underscores the conclusion that these causes of action are outside the scope of the collective bargaining agreement and are neither derived from nor intertwined with any provision of the agreement. If, indeed, a judicial "look see" is required to confirm that conclusion, so be it. A "look see" does not mean preemption is the inevitable and automatic result.

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[2] *Barnes v. Stone Container Corp.*, 942 F.2d 689 (9th Cir. 1991).

[3] *Magerer v. Sexton*, 912 F.2d 525 (1st Cir. 1990).

[4] *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620 (8th Cir. 1989).

The Company had no legal or contractual right to imprison or search its employees in the circumstances presented herein. The lower court's glib proclamation, extinguishing their fundamental state law rights, should not stand.

CONCLUSION

For the reasons argued above, this petition for a Writ of Certiorari to the Ninth Circuit should be granted.

Respectfully submitted,

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